

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHARLES G. LYNCH,

Grievant,

v.

Docket No. 2016-1872-CU

CONCORD UNIVERSITY,

Respondent.

DISMISSAL ORDER

Grievant, Charles G. Lynch, filed this grievance against his employer, Respondent, Concord University, dated June 30, 2016, stating as follows: “[o]n 6/14/16 Without a mutual agreement being established I was assigned duties which are not in my job description, nor job related (Item ID 4576 Helpdesk Ticket). WV Code: Section 18B-7-12 Additional employment by mutual agreement to be filed with governing board.” As relief sought, Grievant seeks “[i]n the future, if one is to perform tasks which are not in their job description, nor job related a mutual agreement needs to be established. WV Code: Section 18B-7-12 Additional employment by mutual agreement; agreement to be filed with governing board.”

A level one proceeding was conducted on July 13, 2016. The grievance was denied at level one by letter dated August 2, 2016. Grievant appealed to level two on August 6, 2016. A level two mediation was conducted on February 10, 2017. Grievant perfected his appeal to level three on February 23, 2017. Respondent, by counsel, filed a Motion to Dismiss on March 16, 2017, arguing that this grievance is precluded by *res judicata*. Grievant was given until March 28, 2017, to file any response to the Motion to Dismiss. Grievant submitted an email response thereto on March 25, 2017, which was

received by the Grievance Board on Monday, March, 27, 2017. Grievant appears *pro se*. Respondent appears by counsel, Candace Kraus, Esquire, Deputy General Counsel, West Virginia Higher Education Policy Commission. This matter is now mature for decision.

Synopsis

Grievant previously filed a grievance alleging that he was assigned duties outside his job description and that a mutual agreement for employment was required for such. That earlier grievance was adjudicated on the merits. However, before that decision was issued, Grievant filed the instant grievance raising the same claim. In both grievances, the assignment Grievant challenged involved cleaning light fixtures without performing electrical work. Respondent argues that the doctrine of *res judicata* precludes Grievant from bringing this claim. Grievant filed a response to the Motion to Dismiss, but did not address the issue of *res judicata*. Grievant has not denied that the claims he has made in the two grievances are the same. Respondent proved by a preponderance of the evidence that the doctrine of *res judicata* applies to preclude Grievant from pursuing the instant grievance. Therefore, this grievance is Dismissed.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a Trade Specialist II (Electrician).
2. On or about October 15, 2015, Grievant filed a grievance action in which he alleged he was assigned duties that were not listed in his job description; therefore, a mutual agreement for additional employment was required. Grievant had been assigned

to clean the dead insects out of the light fixture covers for the lights in the loading dock area behind the campus kitchen facilities.¹

3. Grievant filed the instant grievance again alleging that he was assigned duties outside his job description, and that, as such, a mutual agreement for additional employment needs established, citing West Virginia Code § 18B-7-12. Grievant did not elaborate as what these assigned duties were. However, in Respondent's Motion to Dismiss, counsel for Respondent noted that, specifically, Grievant had been assigned to clean light fixtures and replace light bulbs. Grievant did not dispute this in the short response he filed with the Grievance Board.

4. In the Decision issued October 3, 2016, in the previous grievance, the undersigned ruled that the assignment to clean the dead insects out of light fixture covers without being required to do any electrical work on the fixture was job related, that West Virginia Code § 18B-7-12 did not apply, and that said Code section did not contain a requirement that the university enter into a mutual agreement for additional employment with a classified employee before assigning the classified employee assignment not included in his or her job description.

Discussion

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq.*" W. VA. CODE ST. R. § 159-1-6.2 (2008). The burden of proof is on the Respondent to demonstrate that the motion to dismiss should be granted by a preponderance of the evidence. "The

¹ See *Lynch v. Concord University*, Docket No. 2016-0478-CU (Oct. 13, 2016).

preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent argues that this grievance is precluded by the doctrine of *res judicata* as Grievant filed a previous grievance litigating the same claim and issues. Grievant was given the opportunity to respond to Respondent’s Motion to Dismiss and the arguments made therein. However, the following was the full extent of Grievant’s March 25, 2017, response: “Grievant received neither documents nor knowledge that WVPEGB had granted Concord University a motion to place grievance Docket No. 2016-1872-CU in abeyance pending decision of the Administrative Law Judge decision of grievance Docket No. 2016-0478-CU.” It is noted that counsel for Respondent stated in the procedural history listed in the Motion to Dismiss that the Respondent’s earlier Motion to Place Grievance in Abeyance had been granted. Respondent’s argument for dismissal had nothing to do with that claim. However, it is noted that there is nothing in the record of this case to suggest that the Motion to Place Grievance in Abeyance was granted. Grievant has not contested Respondent’s claims that the two grievance claims are identical, or that the assignment grieved in the instant matter was cleaning light fixtures and changing light bulbs.

“[T]he preclusion doctrine of *res judicata* may be applied by an administrative law judge to prevent the ‘relitigation of matters about which the parties have already had a full and fair opportunity to litigate and which were in fact litigated.’ *Liller v. W. Va. Human Rights Comm’n*, 180 W. Va. 433, 376 S.E.2d 639 (W. Va. 1988). See also *Boyer v. Wood County Bd. of Educ.*, Docket No. 95-54-309 (Sept. 29, 1995); *Peters v. Raleigh County*

Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995).” *Ashley v. W. Va. Bureau of Senior Serv./Div. of Personnel*, Docket No. 00-BSS-506 (Aug. 1, 2000). Further,

[b]efore the prosecution of a grievance may be barred on the basis of *res judicata*, three elements must be satisfied: 1) there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings; 2) the two actions must involve either the same parties or persons in privity with those same parties. 3), the claim identified for resolution in the subsequent proceeding either must be identical to the claim determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.’ Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997). An assertion that a grievance is precluded by claim preclusion is an affirmative defense that must be proven by a preponderance of the evidence. See generally *Vance v. Jefferson County Bd. of Educ.*, Docket No. 03-19-018 (May 27, 2003).

Morgan v. Div. of Highways, Docket No. 2015-0378-DOT (Jan. 22, 2015). “The identity of issues litigated is the key component to the application of administrative *res judicata*. . . *Res judicata* focuses on whether the cause of action in the second suit is the same as in the first suit.” *Liller* at 646. See also *Ashley v. W. Va. Bureau of Senior Serv./Div. of Personnel*, Docket No. 00-BSS-506 (Aug. 1, 2000). “The doctrine of *res judicata* does not prevent a re-examination of the same question between the same parties when, subsequent to the judgment, facts have arisen which may alter the rights of the litigants.’ Syllabus, *Huntington Brick & Tile Co. v. Public Service Commission*, 107 W. Va. 569, 149 S.E. 677 (1929).” Syl. Pt. 2, *Blethen v. W. Va. Dep’t of Revenue/State Tax Dep’t*, 219 W. Va. 402, 633 S.E.2d 531 (2006)(per curiam).

Based upon the evidence presented, the doctrine of *res judicata* should apply to preclude Grievant from bringing the instant claim. It is undisputed that Grievant previously filed a grievance against Respondent in which he alleged that cleaning light fixtures was

not included in his job description, and that West Virginia Code § 18B-7-12 requires that an additional agreement for employment is required in such circumstances. That grievance was fully litigated, and a final adjudication on the merits has been issued. The prior grievance was denied. The parties do not dispute that in the instant grievance, Grievant is again making this same claim after being assigned the same, or substantially similar, duties. Further, the parties to the grievances are the same. There has been no allegation that any facts have arisen that may alter the rights of the parties. To allow this grievance would grant Grievant a second chance to litigate the same claim. Accordingly, Grievant is precluded from now bringing this grievance.

The following Conclusions of Law support the dismissal of this grievance:

Conclusions of Law

1. “Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq.*” Rules of Practice and Procedure of the West Virginia Public Employees Grievance, 156 C.S.R. 1 § 6.2 (2008).

2. “‘Before the prosecution of a grievance may be barred on the basis of *res judicata*, three elements must be satisfied: 1) there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings; 2) the two actions must involve either the same parties or persons in privity with those same parties. 3), the claim identified for resolution in the subsequent proceeding either must be identical to the claim determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.’ Syl. Pt. 4, *Blake v. Charleston*

Area Med. Ctr., Inc., 201 W. Va. 469, 498 S.E.2d 41 (1997). An assertion that a grievance is precluded by claim preclusion is an affirmative defense that must be proven by a preponderance of the evidence. *See generally Vance v. Jefferson County Bd. of Educ.*, Docket No. 03-19-018 (May 27, 2003).” *Morgan v. Div. of Highways*, Docket No. 2015-0378-DOT (Jan. 22, 2015).

3. “The identity of issues litigated is the key component to the application of administrative *res judicata*. . . *Res judicata* focuses on whether the cause of action in the second suit is the same as in the first suit.” *Liller* at 646. *See also Ashley v. W. Va. Bureau of Senior Serv./Div. of Personnel*, Docket No. 00-BSS-506 (Aug. 1, 2000).

4. Respondent has proved by a preponderance of the evidence that this grievance is precluded by the doctrine of *res judicata*.

Accordingly, this Grievance is **DISMISSED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: May 12, 2017.

Carrie H. LeFevre
Administrative Law Judge